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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION FOR NECESSARY TECHNICAL AMENDMENTS TO THE ARIZONA RULES OF CIVIL PROCEDURE	Supreme Court No. R-17-____ **Petition to Amend the Arizona Rules of Civil Procedure to Adopt Certain Necessary Technical Amendments**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petition this Court to adopt certain necessary technical amendments to the Arizona Rules of Civil Procedure, as proposed in the attached Appendix A. Given the scope and nature of the changes (small and throughout the Arizona Rules of Civil Procedure, but necessary), this rule change Petition is expected to be the most

efficient method of accomplishing these changes.

I. OVERVIEW AND SUMMARY OF PROPOSED CHANGES

Petitioners propose roughly eleven technical amendments to eight of the Arizona Rules of Civil Procedure. As discussed in detail in the change-by-change analysis of Section III below, these amendments are proposed for purposes of further clarity and accessibility of those rules post-work of this Court's Task Force on the Arizona Rules of Civil Procedure ("Task Force").

II. THE CURRENT RULES

The current Arizona Rules of Civil Procedure took effect on January 1, 2017. They comprise the work of the Task Force, as modified by this Court's Order on Petition R-16-0010. With the Task Force's herculean restyling and rule change effort came the knowledge that certain later technical amendments might be necessary to tie up loose ends or fix cross-references inadvertently left unaddressed when the entirety of the civil rules were restyled. This Petition sets forth those technical amendments seen as necessary at this time.

III. THE PROPOSED RULE AMENDMENTS

The proposed rule amendments, attached as Appendix A, would

specifically accomplish the following:

- Amending Rules 4(f)(1) and (2) to delete erroneous references to "this rule" when referring to parties subject to service, as none are actually subject to service under Rule 4—parties are subject to service only under Rules 4.1 and 4.2, for which references are retained.
- Amending Rule 4.2(b) to correct an errant cross-reference: The rule currently refers to "4.1(d) through (i)" when the cross-reference should be to "Rule 4.1(d) through (j)."
- Deleting the "or" following clause (B) of Rule 4.2(i)(2) to be more faithful to both meaning and flow of that rule in the structuring of its list of options for accomplishing service on an individual in a foreign country when there is no internationally agreed means, or if an international agreement allows but does not specify other means.
- Retitling Rule 6(d) "Orders and Other Court-Generated Documents" (instead of "Minute Entries and Other Court-Generated Documents") for clarity. To slightly restyle the rule, also for clarity, Petitioners propose that reference to "an order"

become "an order or other court-generated document" and that subsequent references refer collectively then to court-generated documents.

- Amending Rule 7.1(f)(3), which addresses objections to admission of evidence on written motions, to shorten, for clarity, and to work a bit better with Rule 56(c)(4), which provides the slightly separate procedure for raising objections to the admissibility of evidence offered in support of, or in opposition to, motions for summary judgment.
- Aligning discovery obligations under Rule 26(e), which addresses supplementing and correcting of discovery responses, with corresponding disclosure obligations under Rule 26.1(d)(2): Specifically, Petitioners propose amending Rule 26(e) to provide the procedure for supplementing or correcting a discovery response when a party knows or reasonably should know additional or corrective information is relevant to a hearing or deposition scheduled to occur in less than 30 days. The procedure, which matches that already provided in Rule 26.1(d)(2) of the disclosure rules, is that "the party must supplement or correct the

discovery response reasonably in advance of the hearing or deposition."

- Adding the missing word "verified" before "request" in Rule 54(f)(2): Both Rules 54(f)(1) and 54(f)(2) refer to verified requests so the word should appear in both places.
- Adding Rule 54(f)(3) to better structure Rule 54(f): Rule 54(f)(1) refers to requests for costs when attorney's fees are also requested and Rule 54(f)(2) refers to requests for costs when attorney's fees are not requested, but only Rule 54(f)(2)(D) currently explains the procedure for responses in opposition to (and replies in support of) requests for costs—when the procedure applies to both situations. Turning Rule 54(f)(2)(D) into Rule 54(f)(3) better structures the rule to make that clear.
- Changing Rule 54(i)(1) to add the words "taxable costs, and" before "attorneys' fees" and omit the words "and expenses," so that it is clear that the expenses referred to are actually taxable costs.
- Revising the second paragraph of the comment to Rule 56 to omit the word "current," for clarity and to correct erroneous subsection references.

- Retitling Rule 75(b) to refer to a "Joint Prehearing Statement," instead of just a "Prehearing Statement" so the joint nature of that document is clear.

IV. RATIONALE

The changes described above and set forth in Appendix A are technical amendments identified by Petitioner Shirley J. McAuliffe as she revised and updated the civil practice guide[1] after this Court's Order on Petition R-16-0010 issued on September 2, 2016. Petitioners are a current member (Petitioner Agne) and longtime former member and former chair (Petitioner McAuliffe) of the Civil Practice and Procedure Committee of the State Bar of Arizona ("Committee"). That Committee was made aware of amendments identified by Petitioner McAuliffe in the course of her work, and Petitioners include in this Petition those changes that the Committee agreed were technical amendments. More substantive amendments will likely be the subjects of future petitions.

Waiting to petition for these changes in the future might have resulted in the technical amendments not being adopted until 2019, so

[1] The Arizona Civil Rules Handbook.

Petitioners determined to ask the Court to open them for comment and consider them this rules cycle. The changes are such that adoption by at least January 1, 2018, would be the most logical course.

V. CONCLUSION

The nearly a dozen technical amendments described above and set forth in Appendix A are among those rule changes for which it was determined that near-term action was warranted. For the foregoing reasons, the petitioners urge this Court to take that action at its 2017 Rules Conference and adopt the proposed rule amendments as submitted.

RESPECTFULLY SUBMITTED this 5th day of January, 2017.

SNELL & WILMER L.L.P.

By /s/ *Sara J. Agne*
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By /s/ *Sara J. Agne w/ permission for*
Shirley J. McAuliffe (#006507)

Appendix A

Rule 4. Summons

(f) Accepting or Waiving Service; Voluntary Appearance. There are two ways to accomplish service with the assent of the served party—waiver and acceptance. A party also may voluntarily appear without being served.

(1) ***Waiving Service.*** A party subject to service under ~~this rule,~~ Rule 4.1~~,~~ or 4.2 may waive issuance or service. The waiver of service must be in writing, signed by that party or that party's authorized agent or attorney, and be filed in the action. A party who waives service receives additional time to serve a responsive pleading, as provided in Rule 12(a)(1)(A)(ii).

(2) ***Accepting Service.*** A party subject to service under ~~this rule,~~ Rule 4.1~~,~~ or 4.2 may accept service. The acceptance of service must be in writing, signed by that party or that party's authorized agent or attorney, and be filed in the action. A party who accepts service does not receive the additional time to serve a responsive pleading under Rule 12(a)(1)(A)(ii).

(3) *Voluntary Appearance.*

(A) *In Open Court.* A party on whom service is required may, in person or by an attorney or authorized agent, enter an appearance in open court. The appearance must be noted by the clerk on the docket and entered in the minutes.

(B) *By Responsive Pleading.* The filing of a pleading responsive to a pleading allowed under Rule 7 constitutes an appearance by the party.

(4) ***Effect.*** Waiver, acceptance, and appearance under (f)(1), (f)(2), and (f)(3) have the same force and effect as if a summons had been issued and served.

Rule 4.2. Service of Process Outside Arizona

. . .

(b) Direct Service.

(1) *Generally.* A party may serve process outside Arizona, but within the United States, in the same manner as provided in Rules 4.1(d) through (j)~~(i)~~.

(2) *Who May Serve.* Service must be made by a person who is authorized to serve process under the law of the state where service is made.

(3) *Effective Date of Service.* Service is complete when made, and the time period under Rule 4.2(m) starts to run on that date.

. . .

(i) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed under Rule 4.2(d)—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as set forth by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; ~~or~~

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the pleading being served to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(D) by other means not prohibited by international agreement, as the court orders.

Rule 6. Computing and Extending Time

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(d) ~~Minute Entries~~ Orders and Other Court-Generated Documents. Notices, minute entries, orders, and other court-generated documents are entered on the date they are filed by the clerk. Unless the court orders otherwise, if an order or other court-generated document states that an act may or must be done within a specified time after the ~~order~~ document is entered, the date the ~~order~~ document is filed is "the day of the act, event or default" under Rule 6(a)(1).

Rule 7.1. Motions

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(f) Limits on Motions to Strike.

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(3) *Objections to Admission of Evidence on Written Motions.*

(A) *Objections.* Any objections to, and any arguments regarding the admissibility of, evidence offered in support of or in opposition to a motion ~~(other than a summary judgment motion)~~ must be presented in the objecting party's responsive or reply memorandum and may not be presented in a separate motion to strike or other separate filing, except as provided in Rule 56(c)(4). ~~Rule 56(c)(4) provides the procedure for raising objections to the admissibility of evidence offered in support of, or in opposition to, a summary judgment motion.~~

(B) *Response to Objections.* Any response to an objection must be included in the responding party's reply memorandum and may not be presented in a separate responsive memorandum.

(C) *Objections to Evidence Offered in a Reply Memorandum.* If the evidence at issue is offered for the first time in connection with a reply memorandum, an objecting party may file a separate objection limited to addressing the new evidence and not exceeding 3 pages in length, within 5 days after the reply memorandum is served. No responsive memorandum may be filed unless the court orders otherwise.

Rule 26. General Provisions Governing Discovery

(e) Supplementing and Correcting Discovery Responses. A party who has responded to an interrogatory, request for production, or request for admission must supplement or correct its response if it learns that the response was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties during the discovery process or in writing. A party must supplement or correct a discovery response under this rule in a timely manner, but in no event more than 30 days after it learns that the response is materially incomplete or incorrect. If the party knows or reasonably should know the additional or corrective information is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must supplement or correct the discovery response reasonably in advance of the hearing or deposition.

Rule 54. Judgment; Costs; Attorney's Fees; Form of Proposed Judgments

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(f) Request for Costs.

(1) *Time for Filing Request if a Motion for Attorney's Fees Is Filed.* If a party seeking costs also seeks an award of attorney's fees, a verified request for an award of taxable costs under A.R.S. § 12-332 must be filed on the same day the party files its motion for attorney's fees under Rule 54(g).

(2) *Time for Filing Request if No Motion for Attorney's Fees Is Filed.* If a party seeking costs does not seek an award of attorney's fees under Rule 54(g), a verified request for costs must be filed within the time set forth below:

(A) *Rule 54(c) Judgments.* If a decision adjudicates all claims and liabilities of all of the parties and judgment is to be entered under Rule 54(c), any request for costs must be filed within 20 days after the decision is filed, or by such other date as the court may order.

(B) *Decisions Subject to Rule 54(b)—Adjudicating All Claims and Liabilities of Any Party.* If a decision adjudicates all claims and liabilities of any party:

(i) If that party or another party moves for entry of judgment under Rule 54(b), or includes Rule 54(b) language in a proposed form of judgment, a prevailing party seeking costs must file a verified request for an award of taxable costs under A.R.S. § 12-332 within 20 days after service of the motion or proposed form of judgment seeking Rule 54(b) treatment, or by such other date as the court may order.

(ii) If the court declines to enter judgment under Rule 54(b), or no party seeks entry of judgment under Rule 54(b), a prevailing party seeking costs must file a verified request for costs no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first.

(C) *Decisions Subject to Rule 54(b)—Adjudicating Fewer Than All Claims and Liabilities of a Party.* If a decision or judgment adjudicates fewer than all claims and liabilities of a party, a prevailing party seeking costs must file a verified request for costs no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first.

~~(D) *Response and Reply.* A party opposing a request for costs must file a response within 5 days after the request is served. Any reply must be filed within 5 days after the response is served.~~

(3) ***Response and Reply.*** A party opposing a request for costs must file a response within 5 days after the request is served. Any reply must be filed within 5 days after the response is served.

. . .

(i) Scope; Jurisdiction.

(1) ***Scope.*** Rules 54(f) and (g) do not apply to claims for taxable costs, and attorney's fees ~~and expenses~~ that may be awarded as sanctions under a statute or rule, or if the substantive law requires fees to be proved at trial as an element of damages.

(2) ***Jurisdiction***. If a judgment certified under Rule 54(b) adjudicates fewer than all of the claims and liabilities of any party, the court retains jurisdiction:

(A) to award costs with respect to that judgment, if a request for costs is timely filed under Rule 54(f); and

(B) to award attorney's fees with respect to that judgment, if a motion for fees is timely filed under Rule 54(g).

Rule 56. Summary Judgment

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Comment

2017 Amendments

Rule 56 was amended in significant respects in 2013. The 2013 amendments adopted some of the 2007 federal stylistic revisions, while retaining other unique aspects of Arizona's rule (such as the provisions of subdivision (c)(3) governing supporting and opposing statements of fact, which have no counterpart in FRCP 56). The 2017 amendments retain the substance of the 2013 amendments, but propose additional stylistic changes to simplify and clarify the rule. Some of the subdivisions of the current rule are reordered to conform to the structure of Federal Rule 56.

In addition to stylistic improvements, subdivision (c)(2) is modified to eliminate provisions governing stipulated or court-ordered extensions of briefing schedules. Those provisions of the former rule predated the adoption of Rule 7.1(g), which now provides uniform procedures governing and limiting the extension of briefing schedules on motions. Rule 7.1(g)'s provisions apply to motions for summary judgment under Rule 56. The structure of Rule 56(c)(3) is modified to add subdivisions and headings, consistent with the federal rule stylistic conventions. ~~Portions of current subdivision (e), governing the form of affidavits, are moved to subdivision (c)(5) and (6), to conform more closely to the federal rule's structure.~~ Former subdivisions (e)(1) and (e)(2), governing affidavits, are moved to subdivisions (c)(5) and (c)(6), respectively, to conform more closely to the federal rule's structure.

Subdivision (f) of the former rule is moved to subdivision (d), to conform to the federal rule's structure. The revised rule now incorporates into the rule's text the specificity requirements set forth in Arizona case law for obtaining a continuance to conduct additional discovery, as set forth in *Simon v. Safeway, Inc.,* 217 Ariz. 330, 173 P.3d 1031 (App. 2007). *See* Rule 56 (d)(1)(A) (identifying five factors that must be addressed, if applicable, in an affidavit supporting a Rule 56(d) request).

Rule 75. Hearing Procedures

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(b) Joint Prehearing Statement.

(1) *Requirement.* No later than 10 days before the hearing, the parties or their counsel must confer, prepare, and submit to the arbitrator a joint written prehearing statement. In preparing this prehearing statement, the parties and their counsel must consider that the purpose of compulsory arbitration is to provide for the efficient and inexpensive resolution of claims and the parties are encouraged to agree on facts and issues.

(2) *Content.* The statement must contain the following:

(A) a brief statement of the nature of each party's claims or defenses;

(B) a witness list including the subject matter of witness testimony for each witness who will be called to testify;

(C) an exhibit list; and

(D) the estimated time required for the arbitration hearing.

(3) *Evidence Excluded.* Unless the parties agree otherwise or the offering party shows good cause, no witness or exhibit may be offered at the hearing other than those listed and exchanged.

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